IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-906

THOMAS J. WALSH, JR., d/b/a TOM WALSH & CO.,
Petitioner,

v.

E. A. SCHLECHT, *et al.*, as TRUSTEE OF FIVE OREGON-WASHINGTON CARPENTERS-EMPLOYERS TRUST FUNDS,
Respondents.

On Writ of Certiorari to the Supreme Court of Oregon

MEMORANDUM OF HUICO, INC. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE [1]

Huico, Inc. is engaged in prefabrication of pipefitting equipment for use in heavy industrial construction such as power plants, refineries and large pipeline construction including the Trans-Alaskan Pipeline

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[1] Both parties to this cause have consented, in writing, to the filing of this Memorandum. Pursuant to Supreme Court Rule 42, copies of those consents have been lodged with the Clerk.

Project. It employs approximately two hundred persons and, pursuant to appropriate written union collective bargaining agreements, contributes into certain fringe benefits trusts for its unionized employees. These independent trusts were originally negotiated by the unions and the predecessor of Mechanical Contractor Associations of Washington ("MCA")—a multiemployer bargaining association. The trusts expressly provide for participation therein by employers having union agreements, irrespective of whether such employers are members of MCA. Huico, Inc. is not a member of MCA.

MCA has filed a brief, *amicus curiae*, in this cause, urging as an alternative basis for decision, not urged or considered below, that participation in fringe benefit trusts by nonmembers of the employer associations which originally negotiated creation of the trusts is unlawful under Section 302 (c)(5)(B) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(5)(B).

Huico's interest in this matter is confined to addressing this alternative basis for decision advanced by MCA, because MCA is presently pressing an action against Huico in the United States District Court for the Western District of Washington on precisely the same theory it urges here as *amicus*.[2]

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[2] *Mechanical Contractors Associations of Washington* v. *Huico, Inc., et al.*, Cause No. C 75-667S, pending on cross motions for partial summary judgment before the Honorable Morrell Sharpe. MCA has failed to apprise this Court in its *amicus* brief of the pendency of that action in District Court. It has not advised Huico of its *amicus* participation in this case. Nor, to the best of our knowledge, has it called its participation in this case to the attention of the District Court in which it is advancing the same theory as a plaintiff.

In essence, it is Huico's position that this Court should not consider the alternative basis urged by MCA herein. The MCA argument raises questions of judicial first impression which were neither raised nor considered below. The record in this action is plainly insufficient to consider questions of such widespread impact. It would be offensive to the orderly administration of justice to permit MCA, in this unique manner, to "leapfrog" both the development of a full record and decision of the District Court.

ARGUMENT

1. Introduction

This Court granted certiorari to consider the legality under Section 302 of the Labor Management Relations Act, of a general contractor's agreement with a union to assume liability for fringe benefit payments into trust funds for employees of nonunion firms to which it subcontracted work—i.e., for non-employees of the contributing employer. That issue was fully briefed by both parties and decided by the Supreme Court of Oregon.

MCA, as *amicus curiae,* urges an alternative basis for decision—that under Section 302, an employer cannot make contributions for its own employees into fringe benefit trusts absent its membership in the employer association that originally negotiated creation of the trusts, irrespective of the fact that the terms of the trust expressly provide for participation by nonmembers, and notwithstanding written agreements with the unions requiring that such payments be made.

That question was never raised by any party to this proceeding, nor even remotely considered by the courts below because, simply put, it is not pertinent to this case.

2. The Orderly Administration of Justice Requires that Decisions of This Court Be Predicated Upon an Adequate Record

It is a settled maxim that this Court will not decide important issues upon an inadequate record. *McCarthy* v. *Bruner,* 323 U.S. 673 (1944). MCA's argument falls within application of that rule.

For instance, in the subject case, the issues and contracts relate to legality of fringe benefit payments being made for non-employees of the contributor. The issue of *MCA* v. *Huico,* pending below and addressed by the *amicus* here, however, deals with fringe benefit payments for unionized employees of the contributor, pursuant to union contracts requiring such payments, and pursuant to trust instruments expressly providing for receipt of payments from these employers. Of course, neither these contracts nor trusts are before the Court; nor are the trusts in the subject case contained in the Appendix to enable comparison by the *amici.*

Equally significant, the Court should avoid consideration of the contentions advanced by MCA, without the benefit of full briefing by appropriate parties and decisions of the District Court and Court of Appeals. For Section 302 of the Act, and in particular, its "equal representation" and "written agreement" requirements, are the product of extensive legislative history which commands due analysis. That analysis

has been extensively briefed to the District Court in *MCA* v. *Huico,* and will assumedly be addressed by that Court. Obviously, the unilateral assessment thereof by MCA as *amicus* herein, is an inappropriate source of reliance by this Court.

Moreover, consideration of the alternative basis for decision advanced by MCA would enable it to avoid consideration of the inherent vice contained therein—that of a proscribed antitrust tying arrangement inherent in conditioning access to independent trusts upon membership in an employer association. Equally susceptible of avoidance by MCA would be the issue of assuming *arguendo* the propriety of its contentions, what the appropriate remedy should be. If, for instance, as urged by MCA, every trust contributor must participate in selecting trustees, rather than being able to adopt representation by the existing trustees, should their right to make continued employee contributions be banned, with consequent possible loss of benefits to employees? Or, to avoid forfeiture, should equity order modification of the trust to enable compliance with the trustee selection requirements of the Statute as construed by the Court?

Further, the record in the subject case does not apprise the Court of the widespread accepted practice in the construction industry of structuring employee fringe benefit trusts to accept contributions from employers of union members—in order to assure continued benefits to such transient workers—irrespective of the status of the contributing employer as a member of a local employer association. There are, for instance, numerous construction companies who operate nationally and exclusively employ local union

members wherever projects arise. They contribute into local trust funds for the benefit of their union workmen. To hold that such employers must be members of all local associations would seriously impede interstate commerce, by forcing employers to join numerous employer bargaining associations for every craft in every locality they operate. Alternatively, such employers would be forced to establish competing national trust funds. Mandatory membership in local employer bargaining associations is not a goal of national labor policy.[3] Similarly, establishment of duplicative industry trust funds was not contemplated by Congress as an intended result of Section 302.

Most significantly, the position urged by MCA could well cause total and perhaps catastrophic loss to employees who may find themselves suddenly without benefits, notwithstanding years of contributions having been made upon their behalf. See *Moglia* v. *Geoghegan*, 403 F.2d 110 (C.A. 2, 1968), *cert. den.* 394 U.S. 919. The gravity of these consequences, it must be emphasized, require consideration only in orderly evolution of an appropriate record and not in derogation of the processes of the District Court.

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[3] Moreover, given the requirement of numerous local associations that its members be bound to its local collective bargaining agreement, to the exclusion of independently arrived at union agreements, endorsement of MCA's contention would play havoc with established bargaining relationships.

CONCLUSION

For the foregoing reasons, the Court is urged to decide this case on the basis of the principles argued before, and decided by. the courts below and not upon the alternative basis urged by MCA as *amicus curiae*.

Respectfully submitted:

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